

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Re: Appeal to the Board of Patent Appeals and Interferences

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|-------------------------------|---|-----------------------------|
| Applicants: McCormack, et al. |) | Examiner: Matthew D. Matzek |
| |) | |
| Serial No.: 10/646,979 |) | Art Unit/T.C: 1771 |
| |) | |
| Filed: August 22, 2003 |) | Deposit Acct. No: 04-1403 |
| |) | |
| Confirmation No: 1058 |) | Customer ID No: 22827 |

Title: MICROPOROUS STRETCH THINNED/FILM NONWOVEN LAMINATES AND
 LIMITED USE OR DISPOSABLE PRODUCT APPLICATIONS

1. **NOTICE OF APPEAL:** Pursuant to 37 CFR 41.31, Applicant hereby appeals to the Board of Appeals from the decision dated _____ of the Examiner twice/finally rejecting claims _____.
2. **BRIEF** on appeal in this application pursuant to 37 CFR 41.37 is transmitted herewith (1 copy).
3. An **ORAL HEARING** is respectfully requested under 37 CFR 41.47 (due within two months after Examiner's Answer).
4. Reply Brief under 37 CFR 41.41(b) is transmitted herewith (1 copy).
5. "Small entity" verified statement filed: [] herewith [] previously.

6. **FEE CALCULATION:**

| | Fees |
|--|---------------|
| If box 1 above is X'd enter \$ 540.00 | \$ _____ 0.00 |
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| If box 3 above is X'd enter \$1,080.00 | \$ _____ 0.00 |
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PETITION is hereby made to extend the original due date of _____, hereby made for an extension to cover the date this response is filed for which the requisite fee is enclosed (1 month \$130; 2 months \$490; 3 months \$1,110; 4 months \$1,730, 5 months \$2,350) _____ \$ _____ 0.00

SUBTOTAL: \$ _____ 0.00

Less any previous extension fee paid since above original due date. - \$ _____ 0.00

Less any previous fee paid for prior Notice of Appeal since Board did not render a decision on the merits. MPEP § 1204.01 - \$ _____ 0.00

Less any previous fee paid for submitting Brief on prior Appeal since Board did not render a decision on the merits. MPEP § 1204.01 - \$ 0.00

SUBTOTAL: \$ 0.00

If "small entity" verified statement filed previously,
 herewith, enter one-half (½) of subtotal and subtract - \$ 0.00

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- Fee enclosed.
- Charge fee to our Deposit Account/Order Nos. in the heading hereof (for which purpose one additional copy of this sheet is attached)
- Charge to credit card (attach Credit Card Payment Form – PTO 2038)
- Fee NOT required since paid in prior appeal in which the Board of Appeals did not render a decision on the merits.

The Commissioner is hereby authorized to charge any fee specifically authorized hereafter, or any fees in addition to the fee(s) filed, or asserted to be filed, or which should have been filed herewith or concerning any paper filed hereafter, and which may be required under Rules 16-18 (deficiency only) now or hereafter relative to this application and the resulting official document under Rule 20, or credit any overpayment, to our Account No. shown in the heading hereof. This statement does not authorize charge of the issue fee in this case.

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APPELLANT'S REPLY BRIEF

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

In accordance with 37 CFR § 41.41, Appellant hereby submits its reply brief to
the Examiner's Answer mailed on October 28, 2008, for the subject application.

Section C on page 8 of the Examiner's Answer contends (emphasis added):

Figure 7A illustrates carrier resin phase **84** being surrounded by letdown resin phase **86**. The illustrated figure is a cross-section of the invention that clearly demonstrates that carrier resin phase is surrounded by the letdown phase, but it does not demonstrate whether or not the carrier resin is encapsulated at the ends of the invention. Appellant is directed to col. 13, lines 40-59 of Norquist et al. which discloses that the discrete phases **84** are surrounded by the continuous matrix **86** and encapsulated within said matrix. Appellant and Norquist et al. both utilize the **same language to describe the discrete phases that are surrounded and encapsulated by another phase** and as such one of ordinary skill in the art would reasonably conclude that the teachings of Norquist et al. provide for Appellant's limitation of "discrete regions of the carrier resin phase is completely intermixed with and surrounded by the letdown resin phase".

This contention of the Examiner's Answer contains two main errors. First, Appellant and Norquist et al do not use the same language to describe the discrete phases that are surrounded and encapsulated by another phase. Indeed, no form of the word **encapsulate** appears anywhere in Appellant's specification. Nor does Appellant's specification use any form of the word **incorporate** to describe discrete phases. Appellant's specification primarily uses the word incorporate in its incorporation-by-reference statements regarding other patents.

The above-quoted Examiner's Answer's contention errs in a second major way. Words used in Appellant's claims must be interpreted in light of the disclosure in Appellant's specification. Words used in Norquist et al must be interpreted in light of the disclosure of Norquist et al's specification. The mere presence of the same words in Appellant's specification and Norquist et al's specification does not suffice to conclude that the words mean the same things in each of those contexts. The assumption that

the same words have the same meaning in two different specifications constitutes the second error of the portion of the Examiner's Answer quoted above. For Appellant's disclosure differs significantly from the references cited against Appellant's claims. In particular, none of the references cited as rendering Appellant's claims unpatentable contains any counterpart to Fig. 1 of Appellant's specification. Absent some similar disclosure in words or drawings in Norquist et al for example, the above position being taken in the Examiner's Answer becomes untenable.

Section H on page 10 of the Examiner's Answer argues (emphasis added):

The fact that the high melt index polymer is used with another component demonstrates that it may be used in a co-extrusion process. The formation of **core-sheath fibers** is analogous to the formation of the **co-extruded films** in that they both rely on multiple phases of polymers in conjunction to form a continuous construct.

What the Examiner's Answer attempts here is the isolation of a specific commonality between two fundamentally different products and respective processes in an attempt to generalize and dismiss other more relevant and fundamental distinctions between the two products/processes. If Section 103(a) rejections can be premised on such flawed logic, few patents will be granted. In the passage quoted above, the only asserted connection between forming core-sheath fibers and forming co-extruded films is the generalization that both form a continuous construct from two polymers. And yet the Examiner's Answer would have the Board dismiss the significant difference between core-sheath fiber formation and co-extruded film formation on this basis. Appellant respectfully submits that to do so would be to countenance the use of flawed logic as the basis of Section 103(a) rejections.

Respectfully submitted,

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DATED: 12/08/2008

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